



The EU legal framework on equality

„Applying EU Antidiscrimination Law – Seminar for members of the judiciary“

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1

1



Overview

Equality in Union Law

- Primary law
- Secondary law
- Charter of Fundamental Rights
- Side note: Relationship between EU law and national law
- International Instruments

2

2

Historical development



- Equal pay as an element ensuring economic integration/the single market (harmonisation of production costs)
- Article 119 of TEEC Treaty of Rome [now: Article 157 TFEU] "equal pay ... for equal work or work of equal value"

Defrenne decisions of the ECJ; Judgment of 8 April 1976, Defrenne-II (Case 43/75): The Court recognised the **direct effect** of the principle of equal pay for men and women and ruled that the principle applies not only to the action of public authorities but also extends to collective agreements intended to regulate paid labour.

- **First Directives implementing equality:**

- 75/117/EEC (equal pay for men and women)
- 76/207/EEC (equal treatment in access to employment and working conditions)
- 86/378/EEC (equal treatment in occupational social security schemes)
- 97/80/EC (burden of proof in cases of discrimination based on sex)

All four now brought together and recast in Directive 2006/54

3

3

Historical development



Treaty of Amsterdam, 1999: Article 13 TEC (now Article 19 TFEU):

Introduction of the power to take action to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

Extension of the legislation in the area of equal treatment

4

4

Primary law today



- Treaty on European Union (TEU): Articles 2 (the Union's values) and 3 III (the aim is to combat discrimination)
- Treaty on the Functioning of the European Union (TFEU): Articles 8 (aim), 10, 19 und 153 (legislative powers), 157 (equal pay and legislative powers).

5

5

Secondary law



Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

The concepts of direct and indirect discrimination, harassment and sexual harassment is legally defined in this Directive. Employers are required to take preventive measures to combat sexual harassment. Sanctions against discrimination are strengthened, and provision is made for the creation of public bodies in Member States to promote equality between women and men.

Discrimination criteria: sex

Personal Scope: All natural and legal persons in the EU, employers and the self-employed, public and private employers, civil servants

Material scope: Employment and occupation

6

6

Secondary law



Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Directive 2019/1158/EU of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;

Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, and repealing Council Directive 86/613/EEC

7

7

Secondary law



Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Discrimination criteria: race or ethnic origin

Personal scope: persons, as regards both the public and private sectors, including public bodies

Material Scope: very broad, i.a. employment, self-employment, social protection, education, access to and supply of goods and services

8

8

Secondary law



Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Discrimination criteria: Religion or belief, age, disability,
sexual orientation

Personal Scope: all persons, as regards both the public
and private sectors, including public bodies

Material Scope: Employment and Occupation

9

9

Relationship between National Law and Union Law



- Primacy of Union Law
- Direct Effect of Union Law
- Indirect Effect of Union Law
- State Liability

10

10

Primacy



- Union Law has primacy over national law, even over national constitutional law
- Only *precedence of application* not precedence of validity
- Conflicting national law is not to be applied by the national judge

11

11

Direct effect I



- Judgment *van Gend en Loos* (Rs. 26/62)
- ...enables individuals to directly invoke a European law provision before a national Court

12

12

Direct effect II



Direct effect of primary law

Fundamental freedoms

„equal pay for equal work“ (art. 157 TFEU)

Direct effect of secondary law

Regulations: yes

Directives: direct effect only in exceptional cases

13

13

Direct effect III



- In principle only vertical direct effect (state-citizen)

- Conditions:

Expiration of the deadline for transposition

„Unconditional and sufficiently precise“

Not to the detriment of an individual

14

14

Direct effect IV



- Exception: horizontal direct effect (between individuals)
 - Primary law
 - Art. 157 AEUV „equal pay for equal work“
 - Fundamental freedoms: trade unions, sports federations
 - Directives?

15

15

Direct effect V



- Direct effect of Directives in combination with Charter provisions or of Charter provisions?
see CJEU, judgment 20 February 2024, X (C-715/20)

16

16

Indirect effect



- Duty to interpret national law in such a way as to comply with EU law
 - „This obligation permits national courts to ensure the full effectiveness of European Union law when they determine the disputes before them.“ (e.g. C-282/10, Dominguez, para. 24)
 - No interpretation *contra legem*

17

17

State liability



Conditions

- Legislation of EU law intends to confer rights on individuals
- Sufficiently serious breach
- Direct causal link between the breach and the loss suffered

judgments *Frankovich u. Bonifaci* (Rs. C-6/90 u C-9/90); and state liability for not introducing a reference for a preliminary ruling to the ECJ *Köbler* (Rs. 224/01).

18

18

Charter of Fundamental Rights



- Same legal value as the Treaties (Art. 6 para. 1 TEU)
- Primacy
- Direct effect

19

19

Charter of Fundamental Rights



Equality provisions in Chapter III

Article 20: Everyone is equal before the law

Article 21 (1) Non-discrimination

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

20

20

Charter of Fundamental Rights



- Art. 22 (Cultural, religious, linguistic diversity)
- Art. 23 (Equality between men and women)
- Art. 24 (Rights of the child)
- Art. 25 (Rights of the elderly)
- Art. 26 (Integration of persons with disabilities)

21

21

Charter of Fundamental Rights



- Scope of Application: Article 51 para 1
 - Institution and Bodies of the Union
 - ECJ, Ledra Advertising, C-8/15 P
 - ECJ, Test-Achats, C-236/09
 - ECJ, Digital Rights Ireland, C-293/12
 - Member States?

22

22

Charter of Fundamental Rights



Scope of Application: Article 51 (1)

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

23

23

Charter of Fundamental Rights



First decision of the ECJ after entry into force of the Charter (26.02.2013, Åkerberg Fransson, C-617/10):

- Art. 51(1) confirms the Court's case-law
- Fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations
- if national legislation falls within the scope of European Union law, the Charter applies and the Court, when requested to give a preliminary ruling, must provide all the guidance as to the interpretation needed
- The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter

24

24

Charter of Fundamental Rights



The issue of horizontal direct effect of Article 21 of the Charter and the evolution of the CJEU case-law

25

25

Charter of Fundamental Rights



Horizontal direct effect?

Rely directly before national courts on EU Law/EU fundamental rights in a dispute between private parties

Differentiate? Directly rely on right vs. setting aside national provision

26

26

Horizontal direct effect



- Horizontal direct effect of Directives/Fundamental Rights?

Mangold (C-144/04)

Kücükdevici (C-555/07)

Dominguez (C-282/10)

AMS (C-176/12)

Dansk Industri (DI) (C-441/14)

IR (C-68/17)

Egenberger (C-414/16)

Max-Planck-Gesellschaft (C-684/16)

Cresco (C-193/17)

Landespolizeidirektion Niederösterreich (C-650/21)

27

27

Horizontal Direct Effect



Kücükdevici (C-555/07) – age discrimination

- Labour law; statutory minimum notice period

- para 43:

“...European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78 ...”



Charter + Directive

28

28

Horizontal Direct Effect



- **Egenberger** (C-414/16), discrimination on grounds of religion

Prohibition of all discrimination, which is laid down in Article 21(1) of the Charter, is sufficient in itself [and does not need to be made more specific by provisions of EU or national law] to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law

Consequence: Guarantee the full effectiveness of those articles by disapplying any contrary provision of national law

➔ Art. 21 = sufficient in itself

29

29

Horizontal Direct Effect



- **ASM** (C-176/12)

Article 27 Charter ('Workers' right to information and consultation within the undertaking')

Wording of Article 27: in order to be fully effective, it must be given more specific expression in European Union or national law.

Difference with *Kücükdeveci* in so far as "the principle of non-discrimination on grounds of age is sufficient in itself to confer on individuals an individual right which they may invoke as such"

30

30

Horizontal Direct Effect



- CJEU, judgment 20 February 2024, X (C-715/20)
- Art. 47 CFR (right to effective judicial protection)

31

31

Horizontal Direct Effect



- Critical aspects of horizontal direct effect?
- National Constitutional law?

32

32

International Instruments



- Council of Europe:
 - ECHR (Article 14 und Protocol No. 12) and the European Social Charter; the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence)
- United Nations:
 - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
 - Convention on the Elimination of all Forms of Racial Discrimination (CERD)
 - Convention on the Rights of Persons with Disabilities (CPWD)
- International Labour Organization (ILO):
 - e.g. Conventions no. 100 (equal remuneration) and no. 111 (Equal treatment in employment)

33

Relationship between International Law and Union Law



- International Conventions ratified by the EU form an '*integral part*' of EU law, insofar as the subject matter of a Convention falls within the EU's powers. (Air Transport Association of America, C-366/10)
- For example: United Nations Convention on the Rights of Persons with Disabilities, ratified by the EU, hence Directive 2000/78 "must, as far as possible, be interpreted in a manner consistent with that convention", cf. judgment of 11 April 2013, Ring, C-335/11
- See also Opinion of AG Wahl, Mascellani (C-221/13) regarding the ILO Convention

34

34



Thank you very much for your attention!

35